

A SYARIKAT SYED KECHIK HOLDINGS SDN BHD & ORS

v.

SYED GAMAL SYED KECHIK AL-BUKHARY

B HIGH COURT MALAYA, KUALA LUMPUR
K ANANTHAM J
[SUIT NO: D24-NCC 2-80-2009]
15 JANUARY 2010

C **CONSTITUTIONAL LAW:** *Courts - Jurisdiction - Muslim litigants - Civil and Syariah Courts - Whether Syariah Court had jurisdiction to grant orders against first plaintiff and its directors - Whether inclusion of defendant as beneficiary in Sijil Fara'id entitled him to interest in affairs of first plaintiff - Whether Syariah Court had jurisdiction in matters relating to company law - Latifah Mat Zin v. Rosmawati Sharibun & Anor*

E **CIVIL PROCEDURE:** *Injunction - Application for - Restraining defendant from interfering with the affairs and administration of the first plaintiff - Whether Syariah Court had jurisdiction to grant orders against first plaintiff and its directors - Whether inclusion of defendant as beneficiary in Sijil Fara'id entitled him to interest in affairs of first plaintiff - Whether Syariah Court had jurisdiction in matters relating to company law - Whether denying plaintiffs injunction would cause irreparable damage - Latifah Mat Zin v. Rosmawati Sharibun & Anor*

F The second and third plaintiffs were the children of the late Tan Sri Dato Syed Kechik @ Syed Bakar Syed Mohammad ('the deceased'). The defendant was a child by a previous marriage. The first plaintiff was a company originally founded by the deceased and presently managed by the second and third plaintiffs as its only directors. According to the second plaintiff, the deceased did not own any ordinary shares in the first plaintiff but owned 100,001 preference shares. The second plaintiff averred in her affidavit in support of the application for an injunction (encl. 3) that the deceased as a preference shareholder carried no right to the equity of the first plaintiff or any voting rights. On 31 July 2009, the defendant applied and obtained the Sijil Fara'id from the Kuala Lumpur Syariah Court whereby he was recognised as a beneficiary of the estate of the deceased and accorded a 44% share as the only male heir of the estate. The defendant upon being confirmed as a beneficiary in the Sijil Fara'id caused letters to be written to the second and third plaintiffs seeking information concerning the first

plaintiff including a request that he be allowed to inspect the documents of the first plaintiff. These demands were not met by the second and third plaintiffs to the satisfaction of the defendant. This prompted the defendant to file an *ex parte* application for an injunction and discovery orders with the Syariah Court. The Syariah duly restrained the second and third plaintiffs from selling or otherwise dealing with 44% of the first plaintiff and undertaking any action which could result in the devaluation of the current value of the first plaintiff. On 6 November 2009, the plaintiffs filed an originating summons seeking *inter alia* a declaration that the defendant possessed no interest in the first plaintiff and/or in any event not until the completion of the administration and distribution of the estate of the deceased, in his capacity as a beneficiary. The originating summons was accompanied by an application for an injunction restraining the defendant from *inter alia* interfering with the affairs and administration of the first plaintiff. The application for the interim injunction was primarily grounded on two grounds (i) whether the Syariah court had no jurisdiction to grant orders in the nature of a Mareva or Anton Piller against the first plaintiff and its directors since the Syariah Court had no jurisdiction in matters relating to company law and (ii) whether the inclusion of the defendant as a beneficiary in the Sijil Fara'id did not entitle him to any interest in the affairs of the first plaintiff since the preference shares did not carry with it the right to participate in the equity of the first plaintiff.

Held:

- (1) The defendant had not in any of his affidavits disputed the plaintiff's averment that the deceased was only a preference shareholder and a preference shareholder under the Articles of Association of the first plaintiff was only entitled to a fixed income with no right to participate in the equity of the first plaintiff. The legal matter of whether the defendant as the successor of the deceased's preference shares was entitled to participate in the equity of the first plaintiff was a company law issue for determination by the Civil Court. The Syariah Court had not sought to determine the rights of the defendant as a preference shareholder but proceeded on the premise that the shares of the deceased in the first plaintiff formed part of the estate of the deceased. Be that as it may, since a Court of Law could only grant an injunction when the subject matter was within its jurisdiction and since the subject in the instant case was preference shares and the rights attached to it, it was 'some

- A other non Syariah legal ground'. Accordingly, it followed that the Syariah Court had no jurisdiction to grant the orders in favour of the defendant. As expounded in the case of *Latifah Mat Zin v. Rosmawati Sharibun & Anor* to determine the assets forming the estate of a deceased Muslim, one may have to go, to and fro from the Syariah Court to the Civil Court, depending on whether the issue which called for determination revolved a Syariah legal ground or a non-Syariah legal ground. (paras 4, 6 & 7)
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- C (2) The declaratory relief sought by the plaintiff in the originating summons raised issues which involved serious questions of law. Denying the plaintiffs the injunction sought by them in the originating summons would cause irreparable damage to the plaintiffs, if this court should ultimately make the declaratory orders sought by them. Accordingly, the justice of this case demanded that this court grant to the plaintiffs the orders sought by them in encl. 3. (para 9)
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[Order accordingly.]

- E **Case(s) referred to:**
Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC (refd)
Umi Khalsom Mohamed & Anor v. Haliza Hassan & Anor [2009] 9 CLJ 729 HC (refd)
- F **Legislation referred to:**
Syariah Court Civil Procedure (Federal Territories Act 1998), ss. 199, 200
- G For the plaintiff - Dato' Vijay Kumar; M/s Kumar Jaspal Quah & Aishah
For the defendant - Atan Mustafa; M/s Azmel & Co
- Reported by Suhainah Wahiduddin

JUDGMENT

- H
- K Anantham:

- I [1] The second and third plaintiffs are the children of the late Tan Sri Dato Syed Kechik @ Syed Bakar bin Syed Mohammad (the 'deceased'). The defendant is a child by a previous marriage. The 1st plaintiff is a company originally founded by the deceased and presently managed by the Second and third plaintiffs as its only directors. According to the second plaintiff, the deceased did not

own any ordinary shares in the first plaintiff but owned 100,001 preference shares. The second plaintiff avers in para. 5(vii) of her affidavit filed in support of the application for an injunction (encl. 3), that the deceased as a preference share holder was only entitled to dividends at the fixed rate of 8pa, as and when, declared by the 1st plaintiff. The preference shares, according to her, carried no right to the equity of the first plaintiff or any voting rights. Apparently, the articles of association of the first plaintiff also absolved the first plaintiff from providing any notice of general meeting of the first plaintiff and its financial statements to preference share holders. These averments of the second plaintiff have not been disputed by the defendant.

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[2] On 31 July 2009, the defendant applied and obtained the Sijil Fara'id from the Kuala Lumpur Syariah Court whereby he was recognised as a beneficiary of the estate of the deceased and accorded a 44% share as the only male heir of the estate. The second and third plaintiffs and the widow of the deceased are the only other beneficiaries under the Sijil Fara'id. The second and third plaintiffs, in turn, filed Petition No. S31-668-2009 in the High Court in Kuala Lumpur to obtain the letters of administration to administer the estate of the deceased. This application which was filed in September 2009 is still pending disposal. The defendant upon being confirmed as a beneficiary in the Sijil Fara'id caused letters to be written to the second and third plaintiffs seeking information concerning the 1st plaintiff including a request that he be allowed to inspect the documents of the first plaintiff. These demands were not met by the second and third plaintiffs to the satisfaction of the defendant. This prompted the defendant to file an *ex parte* application for an injunction and discovery orders with the Syariah Court. The Syariah Court duly restrained the second and third plaintiffs from selling or otherwise dealing with 44% of the first plaintiff and undertaking any action which could result in the devaluation of the current value of the 1st plaintiff. A further order issued by the Syariah Court entitled the defendant to enter into all the immovable properties owned by the 1st plaintiff for the purpose of enabling the defendant to inspect the assets and documents of the first plaintiff and thereby determine the value of the shares of the defendant in the first plaintiff. The orders being valid until the outcome of the second and third plaintiff application for the letters of administration of the estate of the deceased. The plaintiffs, not without justification, describes the 1st order granted by the Syariah Court as a Mareva Injunction and the second order as an Anton Pillar Order.

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- A [3] On 6 November 2009, the plaintiffs filed an originating summons seeking *inter alia* a declaration that the defendant possessed no interest in the first plaintiff and/or, in any event, not until the completion of the administration and distribution of the estate of the deceased, in his capacity as a beneficiary. The
- B Originating Summons was accompanied by an application for an injunction restraining the defendant and his servant, agent, from *inter alia* interfering with the affairs and administration of the first plaintiff. The application for the interim injunction was primarily
- C grounded on two grounds. First, that the Syariah Court had no jurisdiction to grant orders in the nature of a Mareva and Anton Pillar against the first plaintiff and its directors since the Syariah Court has no jurisdiction in matters relating to company law. Secondly, the inclusion of the defendant as a beneficiary in the Sijil Fara'id did not entitle him to any interest in the affairs of the first
- D plaintiff since the preference shares did not carry with it the right to participate in the equity of the first plaintiff.

Jurisdiction

- E [4] At the outset, I indicated to both counsels that the basis of the court's decision would be jurisdiction. In other words, if I am satisfied that the Syariah Court had jurisdiction to issue an injunction even on matters relating to company law, I would not examine whether the Syariah Court had rightly exercised its discretion when granting the injunction. I now proceed to deal with
- F the issue of jurisdiction, with this in mind. There is no doubt that Syariah Court has jurisdiction to grant injunctions (see ss. 199 and 200 of the Syariah Court Civil Procedure (Federal Territories Act 1998) ('the Act')). The next issue is, what is the legal matter upon which the Syariah Court had issued the injunction. According to the
- G plaintiffs, and I agree with them, the legal matter is this; 'does a preference shareholder have an interest in the equity of the first plaintiff so as to entitle him to obtain orders of the nature granted to the defendant'. Before I proceed to answer this question, I wish
- H to make the following observation. First, the defendant has not in any of his affidavits disputed the plaintiff's averment that the deceased was only a preference shareholder and a preference shareholder under the articles of association of the first plaintiff is only entitled to a fixed income, with no right to participate in the equity of the first plaintiff. Secondly, that the shares of the first
- I plaintiff have not been included as forming part of the estate of the deceased in the petition filed with the High Court for letters of administration.

[5] Fortunately, the answer to the legal matter before this court, has already been answered by the Federal Court in the case of *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253. Abdul Hamid Mohamad FCJ (as he then was) when dealing with the jurisdiction of the Syariah and Civil Courts over competing claims of beneficiaries over shares in an estate had this to say; 'Secondly, in my view and with respect, while the court was right in holding that probate and administration were outside its jurisdiction, it was wrong in thinking that the issue before it was an issue of probate and administration. It was not. From the judgment, at least it is very clear that the third declaration applied for (that all the 12 beneficiaries of the deceased were entitled to their respective shares in accordance with the 'fara'id) was an Islamic law issue within the jurisdiction of the Syariah Court. However, from the judgment, we do not know whether the contradictory claims over the disputed shares concern the question of gift *inter vivos* or 'hibah' or on some other non-syariah legal ground eg, under companies' law. If it was the former, then Syariah Court should have decided whether there was a 'hibah' in accordance with Islamic law of those disputed shares and then proceed to determine the shares of the beneficiaries, respectively, according to 'Fara'id'. If it was the latter, of course the Syariah Court should not embark on civil law to determine the question whether those disputed shares were part of the estate of the deceased or not. That is a matter for the civil court. If that was the case, what the Syariah Court could do was to stay proceedings until that issue is determined by the civil court. Once that is determined, and if it forms part of the estate of the deceased, then the Syariah Court should proceed to determine the portion to which each beneficiary is entitled to, according to 'Fara'id'. That order is then filed in the civil court, which will give effect to it.'

[6] In my opinion, applying the above pronouncements of His Lordship to the facts of this case, I have little doubt that the legal matter of whether the defendant as the successor of the deceased's preference shares is entitled to participate in the equity of the 1st plaintiff is a company law issue for determination by the civil court. In fairness to the Syariah Court, it must be observed that the Syariah Court has not sought to determine the rights of the defendant as a preference shareholder but proceeded on the premise that the shares of the deceased in the first plaintiff formed part of the estate of the deceased (see exh. SZ4 to encl. 2). Be that as it may, since a court of law can only grant an injunction when the subject matter is within its jurisdiction and since the subject in the

- A instant case is preference shares and the rights attached to it, I hold the legal matter to use the words of Abdul Hamid Mohamad, again as 'some other non Syariah Legal ground'. Accordingly, it follows that the Syariah Court had no jurisdiction to grant the orders in favour of the defendant.
- B [7] The flaw in the submission of counsel for the defendant, in my opinion, is that he takes the position that every issue pertaining to whether an asset forms part of a deceased muslim's estate has to be determined under Syariah Law. In my judgment, this is not so.
- C As expounded by Abdul Hamid Muhammad (as he then was) in *Latifah's* case, to determine the assets forming the estate of a deceased Muslim, you may have to go, to and fro from the Syariah Court to the Civil Court, depending on whether the issue which calls for determination revolves around a Syariah Legal Ground or
- D a non Syariah Legal Ground, to use the words of His Lordship, again. In this respect, if the ruling of Justice Mohamed Apandi Ali in *Umi Khalsom Mohamed & Anor v. Haliza Hassan & Anor* [2009] 9 CLJ 729 is to the effect that every issue relating to whether an asset forms part of a deceased Muslim state must be dealt with
- E under Syariah law, then, I beg to defer.
- [8] Admittedly, my judgment will inconvenience a Muslim beneficiary seeking to recover his share of assets where the entitlement involves company law issues. Unfortunately that is the state of the law and a judge can only enforce the law, as he finds
- F it. In this respect, I am in good company in compelling the defendant to go, to and fro between the civil and Syariah Court to resolve his claim to the shares of the first plaintiff, as His Lordship opined likewise in *Latifah's* case when he said and I quote 'of course, this is very cumbersome. But, that is the only way out
- G under the current law. That is why I call upon the Parliament to step in to remedy the situation'.

Conclusion

- H [9] In my judgment, the declaratory relief sought by the plaintiff in the originating summons raises issues which involve serious questions of law. Denying the plaintiffs the injunction sought by them in the originating summons will cause, in my opinion, irreparable damage to the plaintiffs, if this court should ultimately
- I make the declaratory orders sought by them. Accordingly, the justice of this case demands that I grant to the plaintiffs the orders sought by them in encl. 3 pending the disposal of the O.S. In

passing, I wish to observe that the defendant is not without a remedy since it is always open to him to participate in the petition filed by the plaintiff and obtain relief similar to those obtained by him in the Syariah Court but, in this case, from Civil Court hearing the petition. Of course, whether the defendant will be able to obtain such relief from the Civil Court would depend on the court's ruling on the precise rights attached to a preference shareholder of the 1st plaintiff. I order the defendant to pay costs of RM15,000 to the plaintiffs in respect of encl. 3.

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